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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 476

JOHN ELMER WOODARDS,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

JOHN ELMER WOODARDS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this cause on March 30, 1966, affirming his conviction of first degree murder without recommendation of mercy.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Court of Appeals of the Ninth Judicial District of Ohio is unreported and is printed in Appendix A, *infra,* p. 18a.

The opinion of the Supreme Court of Ohio which affirmed the conviction, printed in Appendix A, *infra,* p. 1a, is reported at 6 Ohio St. 2d 14, 215 N. E. 2d 568 (1966). The judgment of the Supreme Court of Ohio is printed in Appendix A at page 30.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered on March 30, 1966. Upon petitioner's timely application, the time within which petition for certiorari might be filed was extended by this Court from June 28, 1966 until August 25, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I. Does the mandatory imposition of the death penalty upon the petitioner as a consequence of a state conviction of murder in the first degree without a recommendation of mercy violate the Eighth and Fourteenth Amendments to the United States Constitution?

II. In a state prosecution for murder in the first degree where the petitioner has interposed the defense of insanity, is the trial court's limitation of the proof and the consideration of the jury in determining the insanity of petitioner to whether the accused had both (a) insufficient mental power to determine right from wrong and (b) a lack of will power to accept the right and reject the wrong, an arbitrary, capricious, and fundamentally unfair test of criminal responsibility, in the light of present medical and psychiatric knowledge and, consequently, a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution?

III. Did the arresting officer, whose only basis for a warrantless arrest and search of the residence of the accused was (1) knowledge that the assailant must have been known to the murder victim since there was no sign of forcible entry of the home of the deceased, (2) knowl-

edge that the accused was known to the victim, having been a previous tenant in her upstairs apartment, (3) knowledge that the accused had left owing back rent and had done some damage to the premises, (4) knowledge that about two months earlier, an attempt to serve an assault and battery warrant upon the accused in connection with another matter had failed because the accused was out of state at that time, and (5) knowledge that about one and one half years earlier another officer had questioned (but not charged) the accused in connection with several burglaries, have probable cause to arrest the accused and search his home within the requirements of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

IV. In the absence of an emergency, and where the police had ample opportunity to procure an arrest and search warrant but failed to do so, is a warrantless arrest and search of the home of the accused *per se* unlawful and unreasonable within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

V. Was a warrantless search of the entire premises of the petitioner incident to an arrest of the petitioner outside his residence?

VI. Was a warrantless search of the entire premises of the petitioner a broad, general and roving search in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

VII. Was the seizure of blood-stained clothing from the home of the petitioner a seizure of evidentiary matter only, so that, whether or not the search which produced it was reasonable, the seizure violated the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

VIII. Was the illegality of the arrest, search and seizure cured by the consent of anyone authorized to waive the constitutional rights of petitioner?

IX. Where the accused, an emotionally disturbed 24 year old man of low-normal intelligence who completed the eighth grade with difficulty, and whose ability to comprehend was disproportionately low, was arrested and held in solitary confinement for three days, during which time he was interrogated in relays by police officers for several intervals, including one of approximately five hours in length, where the accused denied participation in the murder with which he was ultimately charged at the outset of the interrogation, and neither requested nor was advised of his right to counsel until after his confession had been obtained, should confessions so obtained have been suppressed as violative of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

X. Where the accused was arrested without a warrant and without probable cause to arrest, and where, during his detention pursuant to such arrest, the accused was subjected to police interrogation which resulted in a confession by the accused, should such a confession obtained by reason of such illegal arrest and detention be suppressed in state criminal proceedings as violative of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution?

XI. Where the accused, an emotionally disturbed 24 year old man of low-normal intelligence who had completed the eighth grade with difficulty and whose ability to comprehend was disproportionately low, was arrested and held in solitary confinement for three days, where he was interrogated at intervals during the period of his confinement by police officers in the absence of counsel and where, during the course of such interrogation the interro-

gating officers, in an effort to induce a confession, confronted the accused with articles of blood-stained clothing illegally seized from his home, should confessions so obtained have been suppressed as violative of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

XII. Where the accused, an emotionally disturbed 24 year old man of low-normal intelligence who had completed the eighth grade with difficulty and whose ability to comprehend was disproportionately low, was arrested and held in solitary confinement for three days, during which time he was interrogated at intervals by police officers in relays, where one of the intervals of interrogation was of approximately five hours duration, where the accused at the outset of the interrogation denied participation in the murder with which he was ultimately charged, where, during the course of the interrogation the accused neither requested nor was advised of his right to counsel, and the accused was not brought before a magistrate upon a charge until the fourth day after his arrest, and then only after a full confession had been elicited from him, even though the accused could reasonably have been charged and brought before a magistrate considerably earlier and before the accused confessed to the murder with which he was ultimately charged, should a confession obtained by reason of such delay in arraignment be suppressed in state criminal proceedings as violative of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

XIII. Has petitioner understandingly, knowingly and deliberately waived his federal constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution by failing to move to suppress evidence in advance of trial, or by any other conduct during the course of the trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statutes.

The full text of each of Ohio Revised Code Sections 2321.03, 2505.21, 2901.01, 2935.05, 2935.07 and 2935.14 and Rule 5(a), Federal Rules of Criminal Procedure is reprinted in Appendix B, *infra*, pp. 31a-34a.

STATEMENT.

Petitioner was indicted, tried and convicted of first degree murder in the Common Pleas Court of Lorain County (R. 1117, 1156). The trial commenced on January 20, 1964 (R. 6) and on January 31, 1964, the jury returned a verdict of guilty, without a recommendation of mercy (R. 1156). When such a verdict is returned in Ohio, the death penalty is mandatory. Ohio Revised Code, Sec. 2901.01.

On the morning of July 13, 1963, Margaret Van Arsdale, a woman 85 years of age, was discovered dead in her home by a neighbor (R. 29). Subsequent autopsy revealed a crushing injury to the chest, ruptured spleen, lacerations of the vaginal wall and multiple hemorrhages and fractures throughout her body (R. 137-140).

About 11:00 a.m. that morning, a sheriff's deputy arrived at the scene in response to the neighbor's telephone call (R. 274). About 15 minutes later, two other deputies arrived (R. 280) and within a few minutes thereafter, other deputies and a police lieutenant arrived at the decedent's residence (R. 311). The officer in charge of the investigation, Deputy Ondreyco, arrived on the scene at 11:48 a.m. (R. 426). After an investigation of the premises, conversations with the deputies and the neighbors, Ondreyco instructed a deputy to arrest the petitioner (R. 434). The information he had at that time which, in his judgment implicated petitioner in the death of the decedent, was limited to the following facts: (1) the assailant must have been known to the decedent because there was no sign of forcible entry of the premises (R. 435); (2) petitioner and his wife had been tenants of the decedent, and had left the premises in a damaged condition and owing back rent (R. 434); (3) one of the deputies had tried (unsuccessfully because petitioner was out of the state

at the time) to serve an assault and battery warrant upon petitioner about two or three months earlier (R. 435); and (4) about a year and one-half earlier, another deputy had questioned petitioner in connection with several burglaries, offenses with which he was never charged (R. 435).

At about 11:50 a.m., the deputy drove to the home of petitioner's mother-in-law to inquire as to the whereabouts of petitioner (R. 584). He remained about ten minutes, found only the small brother-in-law of petitioner, a boy about eight years old, at home (R. 585), told him that petitioner had been in "a terrible car accident" (R. 801) and took him along to the petitioner's residence, about three miles away (R. 585). The boy showed the deputy the location of the house and about 12:20 p.m., the deputy's unmarked car and a police cruiser containing two other deputies converged on petitioner's house (R. 586). Both cars pulled into the driveway, the boy went to the door and found no one at home (R. 586). The deputy then asked the boy if he had ever entered the house when the occupants were not at home (R. 587). Upon the boy's affirmative reply, the deputy and the boy entered the home (R. 587). The law enforcement authorities had neither an arrest nor search warrant (R. 587), but the deputy searched the house "to see if John [petitioner] was there" and failing to find him, seized a pair of petitioner's boots which he found in petitioner's bedroom (R. 587).

The deputy and the other law enforcement authorities then waited until petitioner returned home (R. 587). After a wait of approximately 25 minutes, petitioner and his wife, who had been marketing, drove into the driveway of their home and stopped their automobile directly behind the deputy's unmarked car, near the clearly identifiable and visible police cruiser (R. 588). As soon as petitioner stepped out of the car, the deputy placed him under

arrest in connection with a fictitious service station robbery. He told petitioner that he had a witness who had observed the robber, that petitioner fit the description of the witness and asked him what he had worn the previous evening (R. 588). Petitioner and the deputy re-entered the house, petitioner pointed out the clothing he had worn, a pair of levis and a pink shirt, in a bedroom (R. 590) and the deputy seized the articles. Later the same afternoon, after petitioner was in jail, the deputy, still without a search warrant, came back to petitioner's house, was granted entry by petitioner's wife, announced that he would have to take more of petitioner's clothing, proceeded to the bedroom and seized another pair of levis, a pair of socks, a pair of shorts (R. 591-592) and a blood-stained handkerchief (R. 601-602). At no time did he ask or obtain the consent of petitioner's wife to remove the specific articles of clothing from the premises (R. 601). All of the clothing seized was ultimately turned over to the Cleveland Police laboratory for scientific analysis (R. 453-454) and bloodstains on the clothing were verified (R. 552-553).

Petitioner remained in custody at the county jail without formal charge from about 2:00 p.m. on July 13, 1963 (R. 436), until about 6:15 p.m. on July 15, 1963. During this period, petitioner was held incommunicado (R. 330-331), questioned in relays by interrogating officers for periods up to "a little more than five hours" at a time (R. 412), and charged with first degree murder immediately and only after he had confessed and re-enacted the murder at the scene (R. 409). Petitioner had denied implication in the murder from the time of his arrest at least until 1:15 p.m. on July 15, 1963 (R. 317-318).

During the course of the interrogation which resulted in petitioner's confession, petitioner was never advised

of his right to counsel (R. 453) because, in one of the interrogating officers' words, "he was innocent at that time" (R. 453), even though petitioner had been accused of complicity in the murder by his interrogators from the very outset of the interrogation (R. 288). Moreover, at the critical moments of the interrogation shortly before the petitioner's confession, petitioner was confronted with the blood-stained clothing seized from his house (R. 483-485, 884).

During the course of the interrogation, the chief interrogation officer, in an obvious attempt to break down the resistance of the accused (R. 445-446), read to him from a book on legal medicine on the subject of sexual perversion and excessive sexual desire and indulgence by elderly men and women (R. 443-444).[1] The officer then explained what he had read in simple language in order to help petitioner understand it. While the officer was defensive in his testimony as to his purpose in reading and explaining this subject matter to petitioner (R. 444-445), it is apparent that he was trying to induce the peti-

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[1] The exact language read and explained to petitioner is set out below:

"* * * Page 608, Sexual Perversions.

"Excessive sexual desire is known as satyriasis, when it occurs in men and nymphomania when it occurs in women. It consists in an abnormal indulgence in sexual intercourse whenever possible and is generally the expression of an advanced compulsion neurosis. The condition may occur in persons of any age. Occasionally, precocious sexual development and practices are found in male and female children below the age of ten; and such individuals are a serious problem inasmuch as they corrupt other children. Elderly people, both male and female, sometimes lose their normal inhibitions, lapse into a libidinous state and commit many sexual transgressions. Most of them are cases of senile dementia and are especially troublesome because they try to pervert children or practice exhibitionism and for this reason run afoul of the law" (R. 444).

tioner to admit sexual relations with the decedent by claiming that she was the aggressor, a defense which ultimately was actually interposed at the trial. Neither his wife nor his parents were permitted to see the petitioner from the time of his arrest until after his confession (R. 780, 805). Petitioner's father visited the jail for this purpose as soon as petitioner was in custody, and was turned away (R. 780) and petitioner's wife telephoned the jail, and spoke to the interrogating officers, who gave non-committal, evasive replies to her questions (R. 805). Petitioner was first allowed to telephone his wife immediately after his confession was obtained by the interrogating officers (R. 806).

July 15, 1963 was a normal working day for the court and there is no evidence that petitioner, but for the desire of the deputies to interrogate him, could not have been charged and arraigned before noon on that date.

Instead, at about 6:15 p.m. on July 15, 1963, one of the deputies took petitioner to the Elyria Municipal Court after hours to charge him with first degree murder (R. 409) and, represented by counsel for the first time, he was arraigned the next day, waived preliminary hearing and was bound over to the grand jury (R. 410).

An indictment for first degree murder was subsequently returned by the Grand Jury (R. 1117), to which petitioner entered pleas of not guilty and not guilty by reason of insanity (R. 1117).

At the trial, the theory of the prosecution was that the decedent had been murdered during the perpetration of rape. The defense, without denying that petitioner had been present in the decedent's home at the time of her death, urged that her death was accidentally caused by the accused when he was in such a drunken condition that he could not have formulated the necessary criminal

intent, and that his acts resulted from the uncontrollable impulse of a diseased mind.

During the prosecution's case, the blood-stained clothing was offered by the prosecution and received in evidence over the objection of the defense (R. 479, 485). Although the prosecution never offered a signed written confession in evidence, testimony as to petitioner's oral confession, contradictory to the theory of the defense, was offered during its case in chief by several prosecution witnesses, over defense objection (R. 298, 322, 385-408).

At the trial, psychiatric testimony was presented by two expert witnesses, one for the prosecution (R. 889) and one for the defense (R. 687). All of the expert testimony (R. 707, 713, 894), the final arguments of counsel (R. 1014, 1051) and the charge to the jury by the trial court (R. 1131-1132) were framed in terms of the *M'Naghten* test of criminal responsibility,[2] to which automatic exception is presumed to have been taken by Ohio law. Ohio Revised Code Sec. 2321.03.

During the course of the trial it developed that petitioner was a 24 year old man (R. 1018) who had completed the eighth grade with difficulty (R. 697), was unable to complete the ninth grade (R. 697), gave up school altogether and worked sporadically thereafter as a laborer (R. 697). He was arrested for robbery at fourteen and for several sex offenses by the time he was seventeen years of

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[2] "* * * Whether at the time of the homicide the brain of the defendant was partially deranged or diseased from some cause, to such an extent that his will power, his judgment, reflection and control of his mind was so impaired that the act of homicide was the result of diseased or deranged mind so that by reason thereof he was unable at the time to control his act, *and that by reason of such condition of mind he was unable at the time to distinguish between right and wrong.*" R. 1131-1132. (Emphasis supplied.)

age (R. 697). In military service, he became a chronic alcoholic, stood court-martial five times and was ultimately dismissed from service with an undesirable discharge (R. 698). He had an unstable marital adjustment and was unable to hold a job (R. 698). Wechsler-Bellevue intelligence test revealed an I.Q. of 85, a score in the low-normal range, but his comprehension ability and his ability to grasp abstract relationships were poor and disproportionately low (R. 725).

Both medical experts agreed that petitioner was a constitutional psychopath (R. 706, 910, 912) who knew the difference between right and wrong (R. 707, 895) but who lacked judgment or control of his impulses (R. 708, 906) and that the pattern of a very sick personality was manifest (R. 707, 911). The medical expert for the defense further described constitutional psychopathic personalities as persons who "cannot live within the confines of any rules of conduct" (R. 707), "who act impulsively and repeat anti-social offenses if unrestrained" (R. 707). He testified that petitioner "lacks the capacity to control himself" and "has the kind of personality which will act on impulse even though he may know that what he does * * * might be wrong" (R. 708). He concluded that petitioner was "suffering from a mental disorder which doesn't permit him to exercise proper control" (R. 710). The prosecution medical expert's testimony was strikingly similar to that of the defense expert except that he denied that constitutional psychopaths lack the capacity to control themselves; he contended that although such persons have the capacity to control themselves "they just do not use it" (R. 910).

From a conviction of first degree murder without a recommendation of mercy, petitioner appealed. The Court of Appeals for the Ninth Judicial District of Ohio affirmed

the conviction on October 28, 1964 and on March 30, 1966, the Ohio Supreme Court affirmed the conviction as well.

It is from these adverse rulings that petitioner seeks relief by petition for certiorari in this Court.

REASONS FOR GRANTING THE WRIT.

I.

CAPITAL PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner stands convicted of first degree murder as that offense is defined in Ohio Revised Code Section 2901.01. The penalty clause of that statute provides that "unless the jury trying the accused recommends mercy" the violator of the statute "shall be punished by death." In the absence of such a mercy recommendation in his case, and in the event of an unfavorable disposition of this application, petitioner will be exterminated at the hands of the State of Ohio in precise conformity with its statutory authority.

Petitioner therefore calls upon this Court to grant his petition for writ of certiorari in order to re-examine the basic question of whether a state has the constitutional power to put an individual to death in deliberate and premeditated fashion in furtherance of its criminological purposes.

In short, petitioner, cognizant of the prior contrary authority [3] seeks reconsideration of the constitutionality of capital punishment by this Court. He contends that through the perspective of present-day experience and morality, capital punishment is "cruel and unusual" as this.

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[3] *Wilkerson v. Utah*, 99 U. S. 130 (1878); *In re Kemmler*, 136 U. S. 436 (1890); *O'Neil v. Vermont*, 144 U. S. 323 (1892); cf. *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947). And see dictum in *Trop v. Dulles*, 356 U. S. 86, 97 (1958).

language is employed in the Eighth Amendment,[4] that the Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth [5] and that, independent of the Eighth Amendment, the infliction of capital punishment as a criminological technique is arbitrary, capricious, beyond the police power of government, bears no reasonable relationship to any legitimate function of government and, consequently, directly violates the Due Process Clause of the Fourteenth Amendment.[6]

In measuring capital punishment against the yardstick of the Eighth Amendment, petitioner urges that execution by the state is both "cruel" and "unusual" as these terms have been interpreted by this Court.

Whatever the precise meaning of these words[7] "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that the power be exercised within the limits of civilized standards." [8]

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[4] Amendment VIII, United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*" (emphasis supplied).

[5] *Robinson v. California,* 370 U. S. 660 (1962). And see dictum in *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, 463 (1947).

[6] See analogous argument of Mr. Justice Brennan, concurring in *Trop v. Dulles,* 356 U. S. 86, 105 (1958).

[7] For purposes of this petition, petitioner will avoid the possible ambiguities and subtleties of meaning of the phrase "cruel and unusual." Despite speculation as to whether its true constitutional meaning is "cruel *or* unusual," "unusually cruel" or whether the words "cruel" and "unusual" are interchangeable in meaning, see *Trop v. Dulles,* 356 U. S. 86, 100, f. n. 32 (1958), this Court has tended to consider the clause in non-technical terms as a basic prohibition against inhuman treatment. See *Weems v. United States,* 217 U. S. 349 (1910).

[8] *Trop v. Dulles,* 356 U. S. 86, 100 (1958).

Beginning almost ninety years ago, this Court gave a static interpretation to its consideration of capital punishment in relation to the Eighth Amendment. In *In Re Kemmler*,[9] conceding that such extreme penalties as "burning at the stake, crucifixion, breaking on the wheel, or the like".[10] were cruel and unusual punishments, the Court held that electrocution was not prohibited by the Eighth Amendment.[11]

But in *Weems v. United States*,[12] a more dynamic approach to interpreting the Eighth Amendment was adopted by this Court. Departing from the *Kemmler* view that the barbarous punishments of old England provided the outer limits of the prohibitions of the Eighth Amendment, Justice McKenna, speaking for the Court, refused to accept the notion that the restriction on cruel and unusual punishments "was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history." [13]

Continuing the dynamic philosophy which has been the father of this Court's more recent progeny, he observed:

> "* * * a principle to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions * * *. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be." [14]

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[9] 136 U. S. 436, 446-447 (1890).

[10] *Id.* at 447.

[11] To the same effect, see *Wilkerson v. Utah*, 99 U. S. 130 (1878) and *O'Neil v. Vermont*, 144 U. S. 323 (1892). Cf. *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947).

[12] 217 U. S. 349 (1910).

[13] *Id.* at 373.

[14] *Ibid.*

This determination that the definition of cruelty must be fashioned in terms of the present and future needs of society rather than some medieval norm which antedated the Bill of Rights has carried forward to this Court's more recent pronouncements on the subject.

In *Trop v. Dulles*,[15] the dynamic approach of *Weems* was expressly approved by this Court. Holding that deprivation of citizenship as a punishment for military desertion was cruel and unusual, Mr. Chief Justice Warren, speaking for the Court, noted that "the words of the [Eighth] Amendment are not precise, and * * * their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [16]

And in *Robinson v. California*,[17] applying the same dynamic view of the "cruel and unusual punishments" clause to the states through the Fourteenth Amendment, the Court held cruel and unusual the punishment of incarceration provided by a California statute for narcotics addiction, without proof of purchase, possession or use.

Despite the protests of the cases which have denied constitutional infirmity to capital punishment[18] because it is only "the infliction of *unnecessary* pain in the execu-

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[15] 356 U. S. 86 (1958).

[16] *Id.* at 100-101. It is true that in an aside which must be considered dictum, the Court commented in *Trop* that "the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty." *Id.* at 99 (Emphasis supplied). But almost a decade has passed since this judicial utterance and petitioner is prepared to demonstrate that a new day—a day in which capital punishment is not widely accepted—has arrived. See argument, *infra*, pp. 20-21.

[17] 370 U. S. 660 (1962).

[18] E.g., *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947).

tion of the death sentence" [19] which violates the command of the Eighth Amendment, the Court's suggestion that somehow its decisions striking down much less severe penalties than death on some relative basis are not inconsistent with preservation of capital punishment,[20] requires re-examination.

The imposition of a fine and twelve to twenty years imprisonment for falsifying a public record,[21] withdrawal of citizenship for desertion[22] and imposition of a relatively short period of imprisonment for narcotics addiction[23] all have been held cruel and unusual punishments on the ground that the excessive length or severity of the punishment in each case was disproportionate to the offense. The humane and civilized direction of these decisions is not here under attack. But petitioner submits that capital punishment—the deliberate snuffing out of human life by the state—is *absolutely* excessive punishment, no matter how heinous the offense sought to be punished, in view of the availability of less drastic means of achieving legitimate governmental ends in the control of criminal conduct.

Viewed against the alternatives of imprisonment for a specific term, life imprisonment, indeterminate sentences or incarceration in a mental institution until cure

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[19] *Id.* at 436 (Emphasis supplied).

[20] "* * * it is * * * plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Trop v. Dulles*, 356 U. S. 86, 99 (1958). But see dissenting opinion of Mr. Justice Frankfurter, joined by Burton, Clark and Harlan, JJ.: "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" *Id.* at 125.

[21] *Weems v. United States*, 217 U. S. 349 (1910).

[22] *Trop v. Dulles*, 356 U. S. 86 (1958).

[23] *Robinson v. California*, 370 U. S. 660 (1962).

is effected, it is difficult to visualize a legitimate governmental purpose for the death penalty. The "permissible aims of punishment (e.g., deterrence, isolation, rehabilitation)" [24] are not, according to present day evidence, any better served by the death penalty than by less homicidal forms of punishment.[25] And one may be permitted wryly to observe that a government which seeks to justify that ultimate invasion of individual rights—the taking of life—must bear the burden of proof of justification. That this burden has not been met is manifest.[26]

The vast philosophic gulf between the Court's present thinking about cruel and unusual punishment and its past adherence to the constitutionality of the death penalty "indicate[s] something wrong at the beginning or that something has become wrong since then. [It] also show[s] that correction, though in process, is incomplete * * *." [27]

It appears manifest that in the period of almost two decades since this Court last had before it the question of the constitutional cruelty of the death penalty,[28] the

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[24] *Rudolph v. Alabama*, 375 U. S. 889, 891 (1963) (dissenting opinion). And see *Williams v. New York*, 337 U. S. 241 (1949); *Trop v. Dulles*, 356 U. S. 86, 111 (1958) (concurring opinion of Brennan, J.).

[25] See collected essays in Bedau, *The Death Penalty in America* (Doubleday 1964).

[26] *Ibid.*

[27] *Georgetown College v. Hughes*, 130 F. 2d 810, 812 (D. C. Cir. 1942).

[28] *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947). Technically, *Resweber* did not consider anew the question decided a half-century earlier in *Wilkerson v. Utah*, 99 U. S. 130 (1878) and *In re Kemmler*, 136 U. S. 436 (1890), but, assuming the validity of these decisions, held that an accidental electrical failure which necessarily subjected a prisoner to the electric chair twice before the death penalty could be executed was not a violation of the Eighth Amendment. The closest the

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attitudes of the nation and the Court in regard to civilized standards of criminal control have been altered markedly in the direction of humane treatment.

It may well be that our society has now reached that level of maturity which recognizes the inherent cruelty of executing human beings as a matter of deliberate governmental policy, a cruelty so well captured in a century-old passage from Dostoevsky:

> "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour and then in ten minutes, and then in half a minute, and then now, at the very moment the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain * * *. To kill for murder is a punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigand. Anyone murdered by brigands, whose throat is cut at night in a wood, or something of that sort, must surely hope to escape till the very last minute * * *. But in the other case (execution) all that last hope, which makes dying ten times as easy, is taken away for certain. There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible * * *."[29]

There are ever-increasing signs that those responsible for the administration of our penal codes, our prison officials, our courts, our criminologists, and the public have

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Court has come since *Resweber* to re-examining this question has been the dictum in *Trop v. Dulles*, see f. n. 16, *supra*, and the dissenting opinion of Mr. Justice Goldberg joined by Douglas and Brennan, JJ. in the denial of certiorari in *Rudolph v. Alabama*, 375 U. S. 889 (1963).

[29] Dostoevsky, *The Idiot*, 19-21 (1958).

reached this level of awareness.[30] Thirteen states[31] have virtually abolished capital punishment, and in those jurisdictions in which capital punishment still remains on the statute books, its virtual abolition is *de facto*, if not *de jure*. According to figures of the United States Department of Justice,[32] the number of executions throughout the nation has been steadily on the decline since 1954, despite substantial population growth and increase in the incidence of crime.[33] The Attorney General of the United States has indicated that the Administration would support legislation to abolish the death penalty for federal crimes[34] and the attacks upon capital punishment by responsible persons have steadily mounted.[35] The news media have joined the battle[36] and such organizations as the American Civil Liberties Union have recently made abolition of capital punishment a part of their legislative and litigation program.[37]

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[30] See collected essays in Bedau, *The Death Penalty in America* (Doubleday 1964).

[31] Alaska, Delaware, Hawaii, Iowa, Maine, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin.

[32] Reported in New York Times, February 18, 1966, Section L, p. 4, col. 1.

[33] Throughout the entire nation only seven convicts were put to death in 1965, New York Times, February 18, 1966, Section L, p. 4, col. 1. In 1964 the total was fifteen, in 1963, twenty-one and in 1962, forty-seven. *Ibid.* In Ohio, where this prosecution originated, there have been no executions for more than three years. Private correspondence, *E. L. Maxwell, Warden, Ohio Penitentiary to Larry S. Gordon; August* 15, 1966.

[34] *Op. cit.*, footnote 32, *supra.*

[35] E.g., Bedau, *The Death Penalty in America* (Doubleday 1964); DiSalle, *The Power of Life or Death* (Random House 1965); Herman, *An Acerbic Look at the Death Penalty in Ohio*, 15 West. Reserve L. R. 512 (June 1964).

[36] See examples of news media opinion collected in Appendix C, pp. 65a-76a.

[37] See ACLU statement in Appendix C, p. 77a.

The "evolving standards of decency that mark the progress of a maturing society" [38] appear clearly to be coalescing in the direction which, in the context of current attitudes, morality and knowledge, has become a constitutional imperative: the removal of the death penalty from our penal landscape.

"The Eighth Amendment expresses the revulsion of man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man." [39] By what more fitting instrument can this last vestige of medieval criminological thought be eliminated from our society?

There is yet another route to the same result. It is well established that in order to meet the test of due process of law, legislation enacted by the state pursuant to the police power must have a legitimate governmental purpose, the legislative means adopted to accomplish such purpose must bear a real and substantial relationship to the legislative goal, and such means must not interfere with private rights to a greater extent than necessary.[40] The legislative scheme which authorizes imposition of the death penalty bears no rational relationship to legitimate governmental aims in the sphere of criminal control and punishment: deterrence, isolation and rehabilitation.[41] The only other end served by capital punishment is what Mr. Justice Brennan has chosen to call "naked venge-

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[38] *Trop v. Dulles*, 356 U. S. 86, 101 (1958).

[39] *Robinson v. California*, 370 U. S. 660, 676 (1962) (concurring opinion).

[40] *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558 (1914); *Liggett Co. v. Baldridge*, 278 U. S. 105, 111-112 (1928); *Treigle v. Acme Homestead Association*, 297 U. S. 189, 197 (1936); 16 *C. J. S.*, Constitutional Law, Sec. 195, pp. 938 *et seq.*

[41] See argument, pp. 18-19, *supra*.

ance" [42]—a governmental aim which is repugnant to our concepts of fundamental fairness.[43]

Petitioner urges this Court to grant his petition for writ of certiorari to review the constitutionality of capital punishment as measured by the Eighth and Fourteenth Amendments.

II.

THE M'NAGHTEN TEST OF CRIMINAL RESPONSIBILITY VIOLATES THE FOURTEENTH AMENDMENT.

Petitioner stands convicted of first degree murder, an offense for which Ohio has imposed the death penalty. His plea of not guilty by reason of insanity squarely placed in issue at the trial the question of his criminal responsibility by reason of his mental and emotional condition.

During the trial, the psychiatric expert testimony presented by both the prosecution and the defense was compressed into the standards of criminal responsibility known as the *M'Naghten* Rule[44] to which Ohio has been committed since 1843;[45] the jury was likewise instructed by the trial court to resolve the issue under the same standard.[46]

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[42] *Trop v. Dulles*, 356 U. S. 86, 112 (1958) (concurring opinion).

[43] "Revenge is a kind of wild injustice which the more man's nature runs to, the more ought law to weed it out." Sir Francis Bacon, reported in *United States v. Freeman*, 357 F. 2d 606; 615 (2d Cir. 1966).

[44] "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case*, 10 Clark and Fin. 200, 210, 8 Eng. Rep. 718, 722 (H. L. 1843).

[45] *Clark v. State*, 12 Ohio 483 (1843).

[46] See portion of charge to jury quoted in f. n. 2, *supra*, p. 12.

Nor is it surprising that the jury rejected the plea of insanity urged by the defense. For, despite unanimity between the experts for both the prosecution and the defense that petitioner was mentally ill at the time of the commission of the charged offense, and despite the almost presumptively insane facts which the jury chose to believe (that petitioner, 24 years old, killed an 85 year old woman during the perpetration of rape), both experts agreed that petitioner knew the difference between "right" and "wrong," and under the jury instructions given by the court, that ended the matter.

It is not petitioner's intention to fault either the trial judge who, following his oath of office, applied the existing law of Ohio to the question, the psychiatrists whose testimony was confined by that court within the *M'Naghten* straitjacket, or the jury which, given the instructions by which it was bound, had no realistic choice. Rather, the villain of this piece is the hoary *M'Naghten* Rule itself, the product of an age of ignorance and superstition, which has grown older but not wiser with use and the passage of time.

Petitioner therefore urges this Court to grant his petition for writ of certiorari to examine the *M'Naghten* test of criminal responsibility and rule that it is an arbitrary, capricious and fundamentally unfair test of criminal responsibility and, consequently, a denial of due process of law as guaranteed by the Fourteenth Amendment. He does not, by any means, suggest that the Court adopt affirmatively any of the alternate formulations of criminal responsibility which various courts have employed to supplant *M'Naghten*[47] or that it evolve a new standard which

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[47] E.g., *Durham v. United States*, 214 F. 2d 862, 875 (D. C. Cir. 1954): "An accused is not criminally responsible if his un-

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incorporates contemporary psychiatric knowledge into a formula which meets Fourteenth Amendment criteria. This Court's bare ruling that *M'Naghten* does not comply with due process standards will be sufficient stimulus to induce the criminal administrative apparatus of each state and federal district to devise imaginative contemporary formulae to replace it.

That civilized society must avoid punishing criminally those who lack substantial capacity to control their behavior is not at this late date in dispute. Nor can it be denied that failure of a state to provide an insanity defense for those accused who seek to assert it is a denial of due process of law within the meaning of the Fourteenth Amendment.[48]

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lawful act was the product of mental disease or mental defect." In *McDonald v. United States*, 312 F. 2d 847, 851 (D. C. Cir. 1962), the court modified *Durham* by defining mental disease or defect to include "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." Cf. *Model Penal Code* (Proposed Final Draft No. 1, 1961): "Section 4.01 *Mental Diesase or Defect Excluding Responsibility*: (1) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." See *Vermont Stat. Anno.* § 13: 4801: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." And see The Royal Commission on Capital Punishment, 1949-1953 Report, Cmd. No. 8932 at 276: "* * * leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible." See also *United States v. Currens*, 290 F. 2d 751, 774 (3rd Cir. 1961); *Blocker v. United States*, 288 F. 2d 853, 859-862 (D. C. Cir. 1961); *State v. Pike*, 49 N. H. 399, 407-408 (1869); *State v. Davies*, 146 Conn. 137, 143-149, 148 A. 2d 251, 254-257, *cert. den.* 360 U. S. 921 (1959).

[48] *Pate v. Robinson*, 383 U. S. 375 (1966).

It is here asserted that the kind of insanity defense that is provided such unfortunates must not be arbitrary or capricious; it must realistically deal with evolving standards of knowledge and morality; in short, it must employ fair and reasonable means of achieving the social values and governmental functions involved.

The origins and antecedents of the *M'Naghten* Rule are well known. Based upon primitive notions of human behavior already discredited, steeped in a milieu of superstition and belief in phrenology, witchcraft and wizardry, born of the vengeance and wrath of a frightened queen,[49] the *M'Naghten* Rule's origins forecast its subsequent value as a scale of criminal responsibility. It would remain a quaint historical curiosity, a ludicrous relic of a simpler age, but for the fact that its imperfections as a standard have clung, octopus-like, to many of our contemporary criminal administrative systems, and even today, as in the case at bar, its use results in the execution or imprisonment of shattered psyches and deficient personalities whose criminal behavior is congenital and to whom, as a matter of its own morality, society should give medical treatment and institutional support rather than fatal charges of electricity and long retributive prison terms.

At this stage of proceedings in the instant case, petitioner will not dwell on the inadequacies of *M'Naghten* as a litmus of criminal responsibility. Many analyses and studies in the area of psychiatry and law and case opinions

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[49] A summary of the history of the M'Naghten Rule appears in the remarkable opinion of Judge Kaufman of the Second Circuit Court of Appeals in *United States v. Freeman*, 357 F. 2d 606 (2d Cir. 1966). For the convenience of the Court, petitioner has reprinted pertinent portions of the opinion in Appendix C, *infra*, pp. 35a-64a. The historical summary may be found *infra*, pp. 41-47a.

have done so in depth.[50] It will suffice to quote from Judge Kaufman's recent opinion in *United States v. Freeman*,[51] for the Second Circuit Court of Appeals:

> "* * * the [M'Naghten] rule is faulted because it has several serious deficiencies which stem in the main from its narrow scope. Because M'Naghten focuses only on the cognitive aspect of the personality, i.e., the ability to know right from wrong, we are told by eminent medical scholars that it does not permit the jury to identify those who can distinguish between good and evil but who cannot control their behavior * * *.
>
> "Similarly, M'Naghten's single track emphasis on the cognitive aspect of the personality recognizes no degrees of incapacity. Either the defendant knows right from wrong or he does not and that is the only choice the jury is given. But such a test is grossly unrealistic; our mental institutions, as any qualified psychiatrist will attest, are filled with people who to some extent can differentiate between right and wrong, but lack the capacity to control their acts to a substantial degree * * *.
>
> "A further fatal defect of the M'Naghten Rules stems from the unrealistically tight shackles which they place upon expert psychiatric testimony. When the law limits a testifying psychiatrist to stating his

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[50] See generally Glueck, *Law and Psychiatry* (1962); Guttmacher & Weihofen, *Psychiatry and the Law* (1952); Roche, *The Criminal Mind* (1958); Watson, *A Critique of the Legal Approach to Crime and Correction*, 23 Law & Contemp. Prob. 611, 618-622 (1958); Rubin, *Psychiatry and Criminal Law* (1965); Biggs, *The Guilty Mind: Psychiatry and the Law of Homicide* (1955); Hall, *Psychiatry and Criminal Responsibility*, 65 Yale L. J. 761 (1956); Rome, *M'Naghten, Durham and Psychiatry*, 34 F. R. D. 93 (1964). See also *United States v. Freeman*, 357 F. 2d 606 (2d Cir. 1966), reprinted in part in Appendix C, *infra*, pp. 35a-64a, *State v. Colby*, 6 Ohio Misc. 19, 215 NE 2d 65 (1966).

[51] 357 F. 2d 606, 618-624 (2d Cir. 1966), reprinted in part in Appendix C, *infra*, pp. 35a-64a.

opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality * * *.

"The true vice of M'Naghten is not * * * that psychiatrists will feel constricted in artificially structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment. For whatever the social climate of Victorian England, today's complex and sophisticated society will not be satisfied with simplistic decisions, based solely upon a man's ability to 'know' right from wrong * * *.

"The gravamen of the objections to the M'Naghten Rules is that they are not in harmony with modern medical science which * * * is opposed to any concept which divides the mind into separate compartments—the intellect, the emotions and the will * * *.

"* * * No one would suggest that a physician—expert called to state an opinion with respect to a litigant's orthopedic or neurological condition should be restricted in his reply to a single isolated cause to the exclusion of other relevant and important findings and conclusions—much less to concepts developed at the outset of Victoria's reign. In a criminal trial, when life and liberty hang in the balance, such arbitrary limitations on expert and jury are all the less defensible."

It must be emphasized that despite overwhelming agreement among medical[52] and juristic[53] experts that the

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[52] E.g., See remarks of Dr. Lawrence Kolb, Director of the New York Psychiatric Institute, Professor and Chairman of the Department of Psychiatry at Columbia University: "* * * answers supplied by a psychiatrist in regard to questions of rightness or wrongness of an act or 'knowing' its nature constitutes a professional perjury." Remarks, Judicial Conference (2d Cir.), "Insanity as a Defense," 37 F. R. D. 365, 387 (1964). See also

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rule necessarily constricts the determination of criminal responsibility within arbitrary and unrealistic standards, this Court has never squarely met the question of whether M'Naghten meets Fourteenth Amendment requirements.[54] The growing dissatisfaction of the courts[55] and legisla-

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Guttmacher, "The Psychiatrist as an Expert Witness," 22 U. of Chi. L. Rev. 325 (1955).

[53] Mr. Justice Cardozo noted that "everyone contends that the present definition of insanity has little relation to the truths of mental life." *What Medicine Can Do For Law*, 32 (1930); Mr. Justice Frankfurter, in testimony before the Royal Commission on Capital Punishment observed: "I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated * * *. I think the M'Naghten Rules are in large measure shams. That is a very strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say 'We'll just juggle them.'." Report of the Royal Commission on Capital Punishment, 102 (1953). See Douglas, "The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists," 41 Iowa L. Rev. 485 (1956); Brennan, "Psychiatry Must Join in Defending Mentally Ill Criminals," 49 A. B. A. J. 239 (1960). And see Report, Royal Commission on Capital Punishment (1953) Cmd. No. 8932, at 276:

> "We consider that a preferable amendment of the law would be to abrogate the M'Naghten Rules * * *."

[54] It is true that in *Leland v. Oregon*, 343 U. S. 790, 800 (1952), Mr. Justice Clark said: "* * * the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law." But this remark was dictum because in *Leland* the issue upon which the decision turned involved the burden and standard of proof required by the state, not the content of the M'Naghten rule itself. Morever, scientific strides in the past decade and one-half, coupled with the expansion of the Fourteenth Amendment criminal due process commands during the same period and extensive experience with the proliferating standards of criminal responsibility in the state and federal courts suggest contemporary re-examination of this position.

[55] Four federal circuit courts have already abandoned M'Naghten as a standard of criminal responsibility. *Durham v.*

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tures[56] with the M'Naghten rule, resulting in a proliferation of different verbal formulae and approaches and rather curious judicial behavior[57] in regard to the problem of criminal responsibility indicates a need for contemporary examination of the rule by this Court, in the context of criminal due process considerations.

> "The genius of the common law has been its responsiveness to changing times, its ability to reflect developing moral and social values. Drawing upon the past, the law must serve and traditionally has served the needs of the present. In the past century, psychiatry has evolved from tentative, hesitant gropings in the dark of human ignorance to a recognized and important branch of modern medicine. The outrage of a frightened Queen has for too long caused us

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United States, 214 F. 2d 862 (D. C. Cir. 1954); *Wion v. United States*, 325 F. 2d 420 (10th Cir. 1964); *United States v. Currens*, 290 F. 2d 751 (3rd Cir. 1961); *United States v. Freeman*, 357 F. 2d 606 (2d Cir. 1966). See also *State v. Davies*, 146 Conn. 137, 148 A. 2d 251 (1959); *People v. Krugman*, 377 Mich. 559, 141 N. W. 2d 33 (1966); *State v. Colby*, 6 Ohio Misc. 19, 215 NE 2d 65 (1966); cf. *State v. Shoffner*, 35 U. S. L. Week 2019 (Wisc. 7-1-66).

[56] In 1957 Vermont abolished *M'Naghten* by statute. Vermont Stat. Anno. § 13:4801. In 1965 New York did the same. New York Penal Law § 1120. Maine and Illinois have done likewise. Maine Revised Stat. Anno., Title 15, § 102; Smith-Hurd Ill. Stat. Anno., Ch. 38, § 6-2.

[57] In *State v. Colby*, 6 Ohio Misc. 19, 22, 215 N. E. 2d 65, 66 (1966), after noting that the trial evidence had complied with M'Naghten sufficiently for the court as trier of fact to find the accused not guilty by reason of insanity, the court gratuitously noted "a duty to speak out on" M'Naghten. "The court has reached the conclusion that * * * the M'Naghten rule * * * is based on an entirely obsolete and misleading conception of the nature of insanity * * *."

In *State v. Shoffner*, 35 U. S. L. Week 2019 (Wisc. 7-1-66) the court ruled that, as an experiment, an accused who asserted insanity as a defense could thereafter be tried under his choice of M'Naghten or the A. L. I. definition.

to forego the expert guidance that modern psychiatry is able to provide." [58]

The need for review of M'Naghten is great. The record in this case presents a clear opportunity.

Petitioner urges the Court to grant his petition for writ of certiorari to examine, and discard as repugnant to the commands of the due process clause of the Fourteenth Amendment, the *M'Naghten* rule of criminal responsibility.

III.

BLOOD-STAINED CLOTHING TAKEN FROM PETITIONER'S HOME WAS SEIZED IN VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner urges this Court to grant his petition for writ of certiorari to review the admission in evidence at his trial of blood-stained clothing seized from his residence as a result of two warrantless searches by state police officers. His contention that the evidence was illegally obtained encompasses Questions Presented, Nos. III, IV, V, VI, VII and VIII, *supra*, pp. 2-4, which are grouped together for treatment in this section because of their relationship to general principles of the law of arrest and search and seizure.

Detached but dedicated adherence to constitutional principle is particularly important in the case at bar, for it cannot be denied that the crime involved was heinous and that blood-stained clothing allegedly[59] connecting the

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[58] *United States v. Freeman*, 357 F. 2d 606, 624-625 (2d Cir. 1966), reprinted in part in Appendix C, *infra*, pp. 35a-64a.

[59] The defense contended throughout that the bloodstained trousers offered in evidence were not those he had worn on the night of the decedent's death (R. 878). Even the prosecution witnesses were confused as to whether the trousers offered in evidence were those seized in the second or third searches of the premises (R. 592-594).

petitioner to the offense was actually seized. But it is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States*, 333 U. S. 10, 15 (1947). This Court "has had frequent occasion to point out that a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U. S. 581, 595 (1948).

It is petitioner's contention that (A) the arresting officers did not have probable cause to arrest petitioner and that any warrantless search conducted incidental thereto must fail because the arrest was illegal; (B) since the police officers had ample time and opportunity to procure an arrest and search warrant, but failed to do so, the warrantless arrest, search and resultant seizure of evidence were illegal, whether or not they had probable cause to arrest or search; (C) since petitioner was arrested outside his home after a preliminary search of his residence in his absence, the search conducted thereafter was not incidental to arrest and, whether or not the arrest was lawful, the warrantless search was illegal; (D) the warrantless search of the entire residence of the petitioner was a general and roving search, and therefore illegal; (E) the seizure of blood-stained clothing from the home of petitioner was a seizure of merely evidentiary matter which can never be legally seized, no matter how lawful the arrest or search which preceded it; and (F) the illegality of the arrest and search was not cured by the consent of anyone authorized to waive petitioner's constitutional rights.

Each of these positions will be considered below.

A.

The Arresting Officers Did Not Have Probable Cause to Arrest Petitioner.

The undisputed testimony in the record[60] demonstrates that petitioner was arrested without a warrant, upon the basis of only the following information in the possession of the arresting officers at the time of his arrest: (1) the assailant must have been known to the victim, because there was no sign of forcible entry of the decedent's residence; (2) petitioner and his wife had been tenants of the decedent and had left the premises in a damaged condition and owing back rent; (3) one of the deputies had tried to serve an assault and battery warrant upon petitioner several months earlier, but without success because petitioner was out of the state at the time; and (4) about one and one-half years earlier, another deputy had questioned petitioner in connection with several burglaries, offenses with which he was never charged.

This Court has most recently declared that the test of whether a warrantless arrest complies with the Fourth and Fourteenth Amendments depends upon "whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." [61]

Acknowledging that this rule is operative in state criminal proceedings, the Ohio Supreme Court in the instant case disposed of the merits of the issue in two paragraphs of its opinion:

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[60] See Statement and record references therein contained, *supra*, pp. 7-14.

[61] *Beck v. Ohio*, 379 U. S. 89, 91 (1964).

"In the instant case, the officers had *probable cause to suspect* the defendant of the offense which had been committed. It was within their knowledge that (1) the assailant must have been known to the victim, since there was no sign of forcible entry; (2) it was an offense of a violent nature; (3) the defendant was known to the victim, having rented her upstairs apartment and had a previous record, including sexual offenses; and (4) he was a large and powerful man and was known to have a violent temper.

"This was not the untested hearsay statement of an unreliable informant but was based upon personal observation of the premises, conversation with the victim's granddaughter, who had known the victim and the defendant, and the personal knowledge of the officers." [62] (Emphasis supplied.)

Petitioner contends that if these facts demonstrate probable cause, then despite declarations by this Court and state courts in the abstract to the contrary, probable cause as a practical constitutional consideration of the lawfulness of an arrest and search has been effectively eliminated. Stripped to its essentials, the facts which the Ohio Supreme Court has sustained as probable cause amount only to knowledge that petitioner, a "bad actor" in the vicinity according to neighborhood folklore, was known to the decedent and therefore, despite the normal animus engendered by the fact that as a former tenant he had done damage to the premises and left owing back rent, decedent might have admitted him into her home without a struggle in the small hours of the night she met her

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[62] *State v. Woodards*, 6 Ohio St. 2d 14, 20-21, 215 N. E. 2d 568, 574-575 (1966). The finding of the Ohio Supreme Court that *at the moment of arrest* the arresting officers knew that petitioner had a previous record of sexual offenses is nowhere supported by the record. See f. n. 60, *supra*, p. 33.

death. Anyone in the world who might have been voluntarily admitted to the decedent's home at that hour was at least as suspect at the moment of arrest as petitioner.

A semantic clue to the reasoning of the Ohio Supreme Court may be its use of the phrase "probable cause to *suspect*," a much looser standard than "probable cause to *believe*," the operating constitutional requirement.[63] Since the mere suspicion of the arresting officers can never be enough to constitute probable cause to validate a warrantless arrest or search,[64] the analytic tool employed as well as the result reached by the Ohio court of last resort are constitutionally infirm.

Petitioner urges the Court to grant review of the Ohio court's finding of probable cause in the instant case under its power to "make an independent examination of the facts, the findings, and the record * * * where necessary to the determination of constitutional rights." [65].

B.

Failure to Obtain an Arrest and Search Warrant When Police Officers Had Ample Time and Opportunity to Do So Invalidates a Warrantless Arrest and Search.

The principle that law enforcement officials are required by the Fourth Amendment to seek a warrant for an arrest and search except upon a showing of *urgent necessity*[66] has been too frequently ignored by the police,

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[63] *Henry v. United States*, 361 U. S. 98 (1959); *Draper v. United States*, 358 U. S. 307 (1959); *Brinegar v. United States*, 338 U. S. 160 (1949).

[64] *Ibid.*

[65] *Ker v. California*, 374 U. S. 23, 34 (1963).

[66] See *McDonald v. United States*, 335 U. S. 451, 455 (1948), for a general statement of the rule and its rationale: "[The Fourth Amendment] guarantee of protection against unreason-

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unfortunately in many instances, with judicial acquiescence.

The dangers to fundamental constitutional values implicit in a system which permits a police officer to seek a warrant or not, at his discretion, are obvious. "An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." [67]

The general rule requiring a warrant subject to narrow exceptions of necessity, rather than as an equally acceptable alternative to no warrant at all, has been, in large measure, eaten away by the corrosive exceptions which have been engrafted upon it. This circumvention of the requirements of the Fourth Amendment stems in large measure from the unfortunate decision of this Court in *United States v. Rabinowitz*[68] which substituted the generalized test of "reasonableness" of a search for the

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able searches and seizures * * *, *with few exceptions,* stays the hand of the police *unless they have a search warrant* * * *. We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency,* the Fourth Amendment has interposed a magistrate between the citizens and the police * * *. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted * * *. We cannot be true to that constitutional requirement and excuse the absence of a search warrant *without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*" (Emphasis added.)

[67] *Beck v. Ohio,* 379 U. S. 89, 96 (1964).

[68] 339 U. S. 56 (1950).

necessity of procuring a warrant if there was time and opportunity to do so.[69] But even in *Rabinowitz*, a magistrate had an opportunity to examine the facts alleged to demonstrate probable cause before the arrest and search, because there the search was incident to an arrest based upon a *valid warrant*. In the present case a judicial officer never had an opportunity to judge the question of probable cause because the police justified their warrantless search of the premises of the petitioner by an arrest which was also without a warrant. Moreover, *Rabinowitz* involved the search of business premises, not private dwellings, which have been accorded special protection by this Court.[70] That *Rabinowitz* has been, at very least, limited to its facts, seems apparent. Both before and since the holding in *Rabinowitz*, this Court has on a number of occasions pointed out that policemen are *not* permitted to make their own choice as to whether or not they will procure a warrant before making an arrest and search—that where urgent necessity to arrest and search are not present and it is practicable to obtain a warrant, an arrest or search without one will be constitutionally defective, even

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[69] For a biting critique of the decision, see Mr. Justice Frankfurter's dissenting opinion in *Rabinowitz*, 339 U. S. 56, 83-84 (1950):

> "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant * * *. It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable * * * [T]he presence or absence of an ample opportunity for getting a search warrant [is] very important. It is not a rule of thumb. It is a rule of the Fourth Amendment."

[70] Cf. *Agnello v. United States*, 269 U. S. 20 (1925); *McDonald v. United States*, 335 U. S. 451 (1948); *Johnson v. United States*, 333 U. S. 10 (1947); *Taylor v. United States*, 286 U. S. 1 (1932).

where the officers had the requisite factual knowledge to constitute probable cause.[71]

The instant case provides a clear illustration of a situation where law enforcement officers had ample time and opportunity to procure a warrant in advance of an arrest and search, but failed or refused to do so.

Here petitioner was married and a resident of the community. There were sufficient police officers deployed to arrest petitioner so that one of them could easily have gone to procure a warrant from a magistrate, if the police had been so inclined. The spectacle of all of these officers sitting in the noonday sun at petitioner's home for almost half an hour waiting for petitioner to return home from a shopping trip with his wife, unfortunately, from the police officers' standpoint, does not present the picture of stark police necessity that would justify their failure or refusal to seek a warrant. This demonstration of cynical disregard for constitutional values should stimulate this Court to re-examine the broad exceptions which have emasculated the general rule that a warrant is an imperative of the Fourth Amendment, to limit these exceptions to overriding police emergency, and to reaffirm the principle that, whether or not a search is incident to a valid arrest "law enforcement agents must secure and use search warrants wherever reasonably practicable."[72]

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[71] *Chapman v. United States,* 365 U. S. 610, 613 (1961); quoting with approval from *McDonald v. United States,* 335 U. S. 451 (1948); *Johnson vs. United States,* 333 U. S. 10 (1947); *Taylor v. United States,* 286 U. S. 1 (1932); *Agnello v. United States,* 269 U. S. 20, 33 (1925); *Weeks v. United States,* 232 U. S. 383 (1914); and see *Trupiano v. United States,* 334 U. S. 699 (1948), overruled on this point two years later in *Rabinowitz.* Mr. Justice Black's dry observation in *Rabinowitz* is pertinent: "In my judgment it would be wiser judicial policy to adhere to the *Trupiano* rule * * * at least long enough to see how it works." 339 U. S. at 67 (dissenting opinion).

[72] *Trupiano v. United States,* 334 U. S. 699, 705 (1948).

Petitioner urges the Court to grant his application for writ of certiorari to review the applicability of the *Rabinowitz* rule of "reasonableness," particularly in relation to searches of private dwellings.

C.

Neither of the Searches Was Incidental to Arrest.

There can be little doubt at this late date that a reasonable search incident to a lawful arrest is constitutionally justifiable in the absence of a warrant,[73] at least as to articles within the immediate physical control of the person arrested.[74] But the search must actually accompany and be incident to the lawful arrest which legitimizes it.[75] Thus, where the arrest occurs several blocks from the searched premises, a warrantless search is not justified as incidental to such arrest,[76] nor is an arrest in a dwelling a justification for a prior search of a garage on the same property.[77]

In the instant case, police officers entered and searched the residence of the petitioner three times, in

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[73] *Abel v. United States*, 362 U. S. 217 (1960); *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Harris v. United States*, 331 U. S. 145 (1947); *Marron v. United States*, 275 U. S. 192 (1927); *Agnello v. United States*, 269 U. S. 20 (1925).

[74] Cf. *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931). And see dissenting opinion of Frankfurter, J. in *United States v. Rabinowitz*, 339 U. S. 56, 70-80 (1950): "I suggest that it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of an arrest * * * the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it * * *."

[75] *Jones v. United States*, 357 U. S. 493 (1958); *Lustig v. United States*, 338 U. S. 74 (1949).

[76] *Agnello v. United States*, 269 U. S. 20 (1925).

[77] *Taylor v. United States*, 286 U. S. 1 (1932).

each instance without a warrant. In none of these instances can the search be classified as incident to an arrest so as to preclude the necessity of obtaining a warrant prior to search. The first time, a police officer entered petitioner's residence in his absence, about 25 minutes before petitioner's return and ultimate arrest. Even if the subsequent arrest had been on the searched premises it would not have justified the warrantless search which preceded it.[78]

The second entry and search occurred immediately after petitioner's arrest. It is significant to note that petitioner was arrested as soon as he stepped out of his car, which he had parked in the driveway of his home, some distance from the residence itself. A search of a dwelling cannot be justified by an arrest in the street.[79]

The third entry and search occurred after petitioner's arrest and after he was already in custody. Any reasons for validating a warrantless search as incident to an arrest "are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." [80]

On each of these occasions, the police officers displayed a callous disregard for the imperatives of the right of privacy. On each occasion [81] evidence was seized which

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[78] *Taylor v. United States*, 286 U. S. 1 (1932); *Jones v. United States*, 357 U. S. 493 (1958).

[79] *Agnello v. United States*, 269 U. S. 20 (1925); *Stoner v. California*, 376 U. S. 483 (1964); cf. *Hernandez v. Superior Court*, 143 Cal. App. 2d 20, 299 P. 2d 678 (1958).

[80] *Preston v. United States*, 376 U. S. 364, 367 (1964).

[81] Except perhaps the first search and seizure. The record is not clear as to whether the boots seized were ever received in evidence. But the principle remains clear because the searches are so interrelated that the illegality of one necessarily invalidates the others. See *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

was subsequently offered and received in evidence against petitioner. If, therefore, any one of the warrantless searches of the petitioner's dwelling was not incident to a lawful arrest,[82] petitioner's trial was tainted by illegally seized evidence. The flagrancy of the misconduct of the police officers in this respect is compounded by that of the Ohio courts which have condoned it. And the fact that the trial at which this illegally seized evidence was introduced resulted in a verdict which has condemned petitioner to death underscores the need for review in this Court.

D.

The Warrantless Search of the Entire Residence of the Petitioner Was a General and Roving Search.

The Fourth Amendment expressly prohibits searches without warrants "*particularly describing the place to be searched,* and *the persons or things to be seized.*" This language has its roots in this country's origins. The founders were all too acutely aware of the evils of the general warrant and writs of assistance.[83]

As a consequence of this historical development, the explicit command of the Fourth Amendment and the imperatives of a free society, this Court has frequently and resolutely set its face against general or roving searches. *Marcus v. Search Warrant,* 367 U. S. 717 (1961). See also Justice Butler's clear language in *Marron v. United States.*[84]

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[82] Petitioner has already urged the unlawfulness of the arrest, *supra,* arguments (A) and (B), pp. 33-39. Even if the court should hold (improperly in petitioner's judgment) that the arrest was valid in the case at bar, however, the warrantless search will still be unlawful if not incident to the arrest.

[83] For a historical account, see *Henry v. United States,* 361 U. S. 98, 100-101 (1959) and *Harris v. United States,* 331 U. S. 145, 157-163 (1947) (dissenting opinion).

[84] 275 U. S. 192, 195-196 (1927).

"General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them * * *."

In the instant case, a police officer entered the defendant's residence after he knew that nobody was at home, ostensibly looking for petitioner, searched the entire house and removed a pair of petitioner's shoes. Petitioner was arrested as he stepped out of his car in the driveway of his residence about half an hour later.

This conduct is a classic example of a general and roving search in which law enforcement authorities, without regard to the possible relevance of items sought, throw a broad dragnet to ensnare the entire contents of a house in order to sift out the tasty and incriminating morsels of evidence they have trapped. Its callousness taints the subsequent searches and seizures as well.[85]

E.

The Seizure of Blood-stained Clothing From Petitioner's Residence Was a Seizure of Mere Evidence, in Violation of the Fourth, Fifth and Fourteenth Amendments.

Petitioner further contends that the seizure of blood-stained clothing from his residence, no matter what the legality of the arrest and search, was an illegal seizure of his private possessions—material which was neither contraband, instrumentalities, nor fruits of crime—solely for the purpose of using them as evidence.

It has long been established that, by the intertwined effect of the search and seizure restrictions contained in the Fourth Amendment and the self-incrimination prohibition of the Fifth, the compulsory seizure and use in

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[85] Cf. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

evidence of private possessions which are neither contraband, instrumentalities nor fruits of crime are constitutionally prohibited.[86]

It is therefore contended that since the pertinent portions of both the Fourth and Fifth Amendments have become commands upon the states through the due process clause of the Fourteenth [87] and by virtue of the extension of the exclusionary rule to the states,[88] these items should have been suppressed at the petitioner's trial.

Petitioner is aware of no case in which this Court has considered the seizure of clothing within the framework of the mere evidence rule. But other courts have had the opportunity to do so.[89]

In the most recent consideration of this problem, Judge Sobeloff, in holding that in a burglary trial the prosecutor's use of clothing seized from the home of the accused violated the mere evidence rule, commented:

> "From time to time the line has wavered in the adjudication of the lawfulness of searches, but in no instance has the Supreme Court faltered in its adherence to the distinction between what may and what may not be seized in a lawful search. Nor is there any rational distinction between private papers that are of only evidential value and articles of clothing of the

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[86] *Boyd v. United States,* 116 U. S. 616 (1886); *Gouled v. United States,* 255 U. S. 298 (1921); *Entick v. Carrington,* 19 Howell's State Trials 1029 (1765); *United States v. Lefkowitz,* 285 U. S. 452 (1932). And see *Harris v. United States,* 331 U. S. 145, 154 (1947) for a concise statement of the rule.

[87] *Mapp v. Ohio,* 367 U. S. 643 (1961) (Fourth Amendment); *Malloy v. Hogan,* 378 U. S. 1 (1964) (Fifth Amendment).

[88] *Mapp v. Ohio,* 367 U. S. 643 (1961).

[89] *Morrison v. United States,* 262 F. 2d 449 (D. C. Cir. 1958) (soiled handkerchief used in committing act of sodomy held: evidentiary); *Hayden v. Warden,* ____ F. 2d ____ 35 U. S. L. Week 2020 (4th Cir. 1966), cf. *Morton v. United States,* 147 F. 2d 28 (D. C. Cir. 1945).

same character. Papers of only evidential value are not the sole items immune from seizure." [90]

Petitioner urges this Court to grant his petition for writ of certiorari to review the mere evidence rule in its application to these facts.

F.

The Illegality of the Arrest and Search Was Not Cured By the Consent of Anyone Authorized to Waive Petitioner's Constitutional Rights.

Although the opinion of the Ohio Supreme Court makes no reference to consent as an excuse for the illegal conduct of the police officers, petitioner feels compelled, because the issue is presented implicitly by the facts in the record, and as a matter of legal symmetry, to plug this aperture in the wall of illegality constructed by the arresting and searching officers.

The justification of an otherwise illegal search on the basis of consent stems from the view that consent operates as a waiver of constitutional objections.[91] But this Court has made it abundantly clear that "courts indulge every reasonable presumption against waiver of fundamental rights." [92] Accordingly, the prosecution has the burden to

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[90] *Hayden v. Warden*, ___ F. 2d ___, 35 U. S. L. Week at 2020 (4th Cir. 1966).

[91] See *Stoner v. California*, 376 U. S. 483, 488, 489 (1964):

> "Nor is there any substance to the claim that the search was reasonable because the police [relied] upon the night clerk's expression of consent * * *. It is important to bear in mind that it was the petitioner's constitutional right which was at stake here and not the night clerk's nor the hotel's. *It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.*" (Emphasis supplied.)

[92] *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938); that federal rules of waiver of constitutional rights are applicable in state prosecutions, see *Brookhart v. Janis*, 384 U. S. 1 (1966).

prove by clear and positive evidence that voluntary consent was given.[93] In this connection, it must be noted that bare submission to official authority is not voluntary consent,[94] and certainly consent will not be inferred where there has been an arrest or other official pressure.[95] Nor can consent to search be obtained through deceit or misrepresentation.[96] Moreover, only the one whose privacy has been invaded, or one clearly acting as his agent, may waive his constitutional rights by giving consent to search.[97]

In the light of these basic principles, it will be recalled that in the instant case, two persons, in addition to the petitioner himself, allowed the police officers access to the premises on the day of his arrest. During the first search, a deputy entered the unoccupied premises in the company of an eight-year old boy who was petitioner's brother-in-law but who did not live on the premises. The boy had been told by police officers that petitioner had been in an automobile accident, and he entered the petitioner's residence under that misconception. Even if the boy's tacit acquiescence to a police officer who had misrepresented his reason for entry could be construed as consent, he did not bear a sufficient relationship to the petitioner or the premises to cut off petitioner's claim of violation of his constitutional right.

The second search, immediately after petitioner's arrest, was accomplished by means of petitioner's acquiescence to official pressure at a time when he was already

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[93] *Amos v. United States*, 255 U. S. 313 (1921).

[94] *Ibid.* And see *Johnson v. United States*, 333 U. S. 10 (1947). Cf. *People v. Wilson*, 145 Cal. App. 2d 1, 301 P. 2d 974 (1956); *State v. Trumbull*, 176 A. 2d 887 (Conn. 1961).

[95] *Channel v. United States*, 285 F. 2d 217 (9th Cir. 1960).

[96] *Commonwealth v. Wright*, 190 A. 2d 709 (Pa. 1963).

[97] *Stoner v. California*, 376 U. S. 483 (1964).

under arrest; the third search, after petitioner was already in jail, was effected by means of a grant of entry onto the premises by petitioner's wife and a bare announcement of the officer's intention to seize additional items from the house, without a request for, or grant of consent to do so. As an additional consideration, it must also be remembered that both petitioner and his wife had been deceived by the police into believing that petitioner had been arrested on a much less serious charge than that for which he ultimately was required to stand trial; any finding of voluntary consent to search must therefore be further discounted because of the misrepresentation of the deputies and the resultant misunderstanding of the seriousness of their plight by the petitioner and his wife.

A valid consent to the illegal arrest, search and seizures described in detail above cannot be manufactured from this record.

IV.

ORAL CONFESSIONS OBTAINED WHILE PETITIONER WAS IN CUSTODY WERE ADMITTED INTO EVIDENCE IN VIOLATION OF THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

Petitioner urges this Court to grant his application for writ of certiorari to review the admission in evidence during the State's case in chief of the testimony of several prosecution witnesses describing oral confessions allegedly made by him during the period he was in custody. His contention that the oral confessions were improperly admitted encompasses Questions Presented, Nos. IX, X, XI and XII, *supra*, pp. 4-5, which are grouped together for treatment in this section because of their relationship to general principles of the law of confessions.

It is petitioner's contention that (A) on the basis of the totality of circumstances, the oral confessions were

involuntary and were the result of a denial of counsel to the petitioner at a critical stage in the adversary proceedings; (B) the oral confessions were obtained during a period of illegal detention following an unconstitutional arrest, and, as the derivatives of an illegal arrest, they must be suppressed under the exclusionary rule which prohibits admission of evidence obtained in violation of the Fourth and Fourteenth Amendments; (C) since the oral confessions were elicited at least in part as a result of confrontation of the petitioner with blood-stained clothing illegally seized from his home, the confessions were inadmissible in evidence as derivative fruits of the illegal search and seizure; and (D) the oral confessions were obtained during a period of illegal detention resulting from the failure of the interrogating officers to arraign petitioner promptly in accordance with state law. Each of these contentions will be considered in sequence below.

A.

Oral Confessions Were Involuntary and Resulted From Denial of Right of Counsel.

The record demonstrates that petitioner was a twenty-four year old man of marginal intelligence who had been barely able to complete the eighth grade, that he could not complete the ninth grade and quit school to work sporadically as a common laborer. His comprehension ability and his ability to grasp abstract relationships, as measured by accepted intelligence measuring techniques, were, in absolute terms, poor, and disproportionately low in relation to his Wechsler-Bellevue I. Q. score of 85. Although his juvenile record and military career were characterized by frequent clashes with authority, his adult record was, prior to the charge for which he was convicted in the case at bar, free of felony charge or conviction. The

record is devoid of any suggestion that petitioner had ever been interrogated while in custody before. Mentally and emotionally, petitioner was a disturbed individual, variously characterized as a "constitutional psychopath," "a very sick personality" and "suffering from a mental disorder." He was a chronic alcoholic and had drunk heavily the day and night before his arrest.

He was arrested without a warrant for the rape-murder of an 85 year old woman, but at the time he was arrested, the arresting officer deceitfully told him only that he was a suspect in a fictitious gasoline station robbery, in violation of the Ohio law of arrest.[98] He was taken to the county jail by the arresting officers about 2:00 p.m. on July 13, 1963, and he remained there without formal charge until about 6:15 p.m. on July 15, 1963, a period of more than 76 hours. During this entire period of detention, petitioner was held incommunicado, questioned at length by interrogating officers operating in relays for as long as five hours at a time, and kept in solitary confinement except during periods of questioning in an interrogation room. At the very outset and during the course of the interrogation, petitioner was told that it could be proved that he was in the home of the decedent at the time of her death, and he was pressed to make a statement. Petitioner persisted in his denial of any implication in the murder at least until 1:15 p.m. on July 15, 1963, more than 71 hours after his arrest. He was never advised of his right to counsel because, according to the testimony of one of the interrogating officers, he was presumed to

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[98] See Ohio Revised Code, Section 2935.07 which reads in pertinent part:

> "When an arrest is made without a warrant by an officer, he shall inform the person arrested of such officer's authority to make the arrest and *the cause of the arrest* * * *." (Emphasis supplied.)

be innocent during the period of interrogation (!) although at all times they treated him as the prime suspect.

As a part of the pressures of the interrogation technique, petitioner was confronted with his own blood-stained clothing illegally seized from his house after his arrest; in addition, the chief interrogation officer read and explained to petitioner in language he could understand significant passages of a book on legal medicine, apparently to demonstrate the prevalence of aggressive sexual behavior among senile women, in the hope that, as a more socially acceptable alternative explanation than rape, the petitioner's admission of sexual relations with the decedent on the night of her death would be more rapidly forthcoming.

At some time in the afternoon of July 15, 1963, petitioner made a full confession. He was taken to the decedent's home where he re-enacted the events which led to decedent's death, and immediately thereafter, about 6:15 p.m., the interrogating officers took him to the Elyria Municipal Court, after its closing hour, to charge him with first degree murder.

Although they telephoned and appeared at the jail during the interrogation period, petitioner's wife and parents were not permitted to see petitioner or to learn the true nature of the charge against him. But immediately after he was charged, petitioner was permitted to telephone his wife and receive visitors.

Petitioner's first contact with a lawyer was at his arraignment the following day. But by then the damage had been done.

Had this Court elected to apply its recent decisions of *Miranda v. Arizona*[99] and *Escobedo v. Illinois*,[100] to

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[99] 384 U. S. 436 (1966).

[100] 378 U. S. 478 (1964).

pending direct appeals, petitioner's clear right to a new trial on the basis that his confession should have been suppressed would require no further comment.[101] But in *Johnson v. New Jersey*,[102] this Court not only concluded "that *Escobedo* and *Miranda* * * * should not be applied retroactively" [103] but further declined "to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced." [104] Whatever the merits of such a stringent and unusual retroactivity policy,[105] petitioner is now bound by *Johnson* to demonstrate the involuntariness of his confession by case law prior to January 31, 1964. Petitioner therefore "invoke[s] a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years." [106]

In considering the voluntariness of a confession under the due process clause of the Fourteenth Amendment,[107]

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[101] The clear testimony of the interrogating officers that during the entire interrogation and after the investigation had focused on petitioner as a suspect, they had refused his family admittance to see him and failed to advise him of his right to counsel falls squarely within the rule of reversal of *Miranda* and within a liberal interpretation of the rule of *Escobedo*.

[102] 384 U. S. 719 (1966).

[103] 384 U. S. 719, 86 S. Ct. 1772, 1780 (1966).

[104] Id. at 1781.

[105] See the dissenting opinion of Mr. Justice Black, joined by Douglas, J. in *Linkletter v. Walker*, 381 U. S. 618, 640 (1965). It is curious to note that under this strict interpretation of retroactivity, both Escobedo and Miranda whose trials occurred *prior* to that of petitioner in the instant case, received the benefit of the liberal confession rules announced in their cases, while petitioner, who was tried *later* than both of them, has no recourse whatever to these rules.

[106] *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772, 1779 (1966).

[107] To the extent that coerced confession standards have been raised by the application of the self-incrimination clause of the Fifth Amendment to the states through the Fourteenth in *Malloy v. Hogan*, 378 U. S. 1 (1964), petitioner asserts this companion argument as well.

"the question in each case is whether the defendant's will was overborne at the time he confessed." [108] "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." [109] This determination can be made "only by an examination of all of the attendant circumstances." [110]

The day has long since passed that "the blood of the accused" was "the only hallmark of an unconstitutional inquisition." [111] More subtle but just as effective means of overpowering the will of an accused have been devised and are in use by skillful professional interrogators. As this Court noted in *Haynes v. Washington*: [112]

> "We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, * * * the secret and incommunicado detention and interrogation * * * are devices adopted and used to extort confessions from suspects."

Confessions elicited from the accused in custody after interrogation have been in a number of instances held to violate the fundamental fairness requirements of the due process clause of the Fourteenth Amendment. At this juncture it will not do to compare all of these fact situations with the circumstances in the case at bar. It will suffice

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[108] *Lynumn v. Illinois*, 372 U. S. 528, 534 (1963); see also *Chambers v. Florida*, 309 U. S. 227 (1940); *Watts v. Indiana*, 338 U. S. 49 (1949); *Leyra v. Denno*, 347 U. S. 556, 558 (1954); *Reck v. Pate*, 367 U. S. 433, 440 (1961).

[109] *Wilson v. United States*, 162 U. S. 613, 623 (1896) and see *Bram v. United States*, 168 U. S. 532 (1897).

[110] *Haynes v. Washington*, 373 U. S. 503, 513 (1963). And see *Columbe v. Connecticut*, 367 U. S. 568 (1961).

[111] *Blackburn v. Alabama*, 361 U. S. 199, 206 (1960); cf. Brown v. Mississippi, 297 U. S. 278 (1936).

[112] 373 U. S. 503, 514 (1963).

to note here that such factors as detention incommunicado, delay in arraignment and protracted questioning,[113] as well as a "weighing * * * the circumstances of pressure against the power of resistance of the person confessing"[114] the complete absence of family, friends or counsel[115] and arrest or detention in violation of state laws[116] have been held to be instrumental, if not determinative. And confessions surrounded by these factors have been struck down despite the relative shortness of the period of detention[117] or the maturity, intelligence or sophistication, so far as police experience is concerned, of the suspect.[118]

In the total circumstances of the case at bar, considering the mentality and emotional instability of the petitioner, the illegality of the arrest and detention, the deceit and pressure applied by the interrogating officers, the failure to bring petitioner before a magistrate until after confession was obtained, the solitary confinement and incommunicado detention, a pattern of coercion surrounding the confession has been amply demonstrated.

Even before *Escobedo* and *Miranda* there was abundant authority to suggest that, under particularly oppressive circumstances, the in-custody interrogation of an accused in the absence of counsel was a denial of the right

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[113] *Fikes v. Alabama*, 352 U. S. 191 (1957).

[114] *Id.*, at 197.

[115] *Blackburn v. Alabama*, 361 U. S. 199 (1959).

[116] *Watts v. Indiana*, 338 U. S. 49 (1949); *Turner v. Pennsylvania*, 338 U. S. 62 (1949).

[117] *Payne v. Arkansas*, 356 U. S. 560 (1958) (three days); *Spano v. New York*, 360 U. S. 315 (1959) (eight hours).

[118] *Haynes v. Washington*, 373 U. S. 503 (1963).

to counsel under the Sixth Amendment,[119] as well as a violation of the self-incrimination clause of the Fifth or the "coerced confession" rule of the Fourteenth.

Although the majority of the Court in *Crooker v. California* [120] and *Cicenia v. Legay* [121] held that there was no separate constitutional right to counsel during in-custody interrogation, its underlying basis for so deciding was the special circumstances rule of *Betts v. Brady,*[122] since abrogated by *Gideon v. Wainwright.*[123]

In a concurring opinion in *Spano v. New York,*[124] a capital case, Justice Stewart, concurring,[125] noted:

> "At every stage in [the] proceedings the accused has an absolute right to a lawyer's help if the case is one in which the death sentence may be imposed." [126]

It is therefore urged that in a capital case the right to counsel was available to the accused during interrogation at the police station even prior to *Escobedo v. Illinois* [127] and that the failure to supply it under the oppressive circumstances here was yet an alternate and separate ground for suppression of the confessions.

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[119] As applied to the states through the Fourteenth. *Gideon v. Wainwright,* 372 U. S. 335 (1963).

[120] 357 U. S. 433 (1958).

[121] 357 U. S. 504 (1958).

[122] 316 U. S. 455 (1942).

[123] 372 U. S. 335 (1963).

[124] 360 U. S. 315 (1959).

[125] Joined by Black, Brennan and Douglas, *JJ.* Since Mr. Chief Justice Warren had already dissented from the contrary holding in *Crooker v. California,* 357 U. S. 433 (1958), the quoted language of Mr. Justice Stewart in the text represents a majority view of the Court at that time.

[126] 360 U. S. at 327.

[127] See lucid discussion of this contention in Herman, The Supreme Court and Restriction on Police Interrogation. 25 Ohio St. L. J. 449, 481-485 (1964).

B.

Since Confessions Were Obtained During Illegal Detention Following Unlawful Arrest, They Must Be Excluded as Derivatives of an Illegal Arrest.

It is here contended that, quite apart from the argument that the totality of circumstances demonstrates a due process violation and a denial of the right to counsel, the illegality of the arrest and subsequent detention, during which the interrogation of the petitioner was accomplished and his confession was obtained, compels the exclusion of the confessions as derivative of the unlawful arrest.

In *Wong Sun v. United States*,[128] this Court held that confessions obtained as derivatives of an unlawful arrest in violation of the Fourth Amendment were suppressible under the exclusionary rule.

In a *per curiam* decision shortly thereafter, *Traub v. Connecticut*,[129] the application of the *Wong Sun* rule to the states was established.

In *Traub*, after the state courts had rejected an appeal of an arson conviction on the ground that a confession had been elicited during illegal detention following an unlawful arrest, this Court vacated the judgment and remanded the case for reconsideration in the light of *Wong Sun* and *Ker v. California*.[130]

Petitioner submits that the illegality of the arrest under both state law[131] and federal constitutional principles[132] invalidates the confessions obtained during the in-custody interrogation which followed as a consequence

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[128] 371 U. S. 471 (1963).

[129] 374 U. S. 493 (1963).

[130] 374 U. S. 23 (1963).

[131] See argument *infra*, p. 57, f. n. 144.

[132] See argument *supra*, pp. 33-39.

of the arrest. The imperatives of the Fourth Amendment and the exclusionary rule, both commands upon the states,[133] require no less.

C.

Confessions, Induced in Part By Confrontation of Petitioner With Illegally Seized Evidence, Must Be Excluded As Fruits of Illegal Search and Seizure.

Petitioner contends that there are further Fourth Amendment implications than those urged in argument (B) *supra*, pp. 54-55 which compel suppression of the confession here in issue. Quite apart from the illegality of the arrest and detention which produced the confessions, petitioner was confronted with the bloodstained clothing which had been seized from his home as the fruit of an illegal search; since the confessions at least partially resulted from such confrontation, the confessions themselves became fruits of the illegal search and, therefore, suppressible under the exclusionary rule.

In *Wong Sun v. United States*,[134] this Court established that Fourth Amendment considerations were relevant to the admissibility of confessions. Recognizing that a Fourth Amendment violation may result in verbal as well as physical derivative evidence,[135] the Court held that confessions obtained as a consequence of an arrest which violated the Fourth Amendment must be suppressed by operation of the exclusionary rule. The applicability of this decision to state criminal prosecutions has been previously discussed.[136]

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[133] *Mapp v. Ohio*, 367 U. S. 643 (1961).

[134] 371 U. S. 471 (1963).

[135] *Silverman v. United States*, 365 U. S. 505 (1961).

[136] See argument IV (B) *supra*, pp. 54-55.

Although petitioner has discovered no decisions of this Court which have suppressed confessions resulting from illegal search and seizure, as distinguished from unlawful arrest, the logical symmetry of the Fourth Amendment requirements in both instances is unmistakable.

Some state and federal courts have already held that a confession obtained after interrogating officers confronted the accused with articles seized in an illegal search must be suppressed under the Fourth Amendment exclusionary rule.[137] It remains for this Court to do the same.

D.

Confessions Resulting From Unnecessary Delay in Arraignment in Violation of State Law Are Inadmissible in Evidence.

Petitioner here contends that, since his confession was obtained by in-custody interrogation during a period of detention resulting from failure of the arresting officers to bring him before a magistrate without unnecessary delay, such illegal detention taints the confession to such an extent that it must be suppressed.

As a function of its supervisory power over the federal courts, this Court has fashioned a broad rule of exclusion of confessions in federal prosecutions. In *McNabb v. United States*[138] and *Mallory v. United States*,[139] the Court held confessions inadmissible if ob-

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[137] E.g., *People v. Rodriguez*, 11 N. Y. 2d 278, 183 N. E. 2d 651, 654 (1962); *McNear v. Rhay*, 65 Wash. 2d 530, 398 P. 2d 732, 739 (1965); *Takahashi v. United States*, 143 F. 2d 118, 122 (9th Cir. 1944). And see concession on this point in the Brief of the Government, pp. 45-46, in *Wong Sun v. United States*, 371 U. S. 471 (1963).

[138] 318 U. S. 332 (1943).

[139] 354 U. S. 449 (1957) (ten hours elapsed between arrest and confession).

tained during an illegal detention resulting from the failure of the arresting officer to bring the prisoner promptly before a magistrate for arraignment pursuant to the requirements of the Federal Rules of Criminal Procedure.[140]

Although this Court has not yet held the *McNabb-Mallory* rule to be of constitutional import, and therefore binding upon the states by virtue of the due process clause of the Fourteenth Amendment, it has been suggested that the implications of *Wong Sun v. United States*[141] compel such a holding.[142] For if, as *Wong Sun* teaches, an *arrest* in violation of the Fourth Amendment taints confessions obtained pursuant to such arrest, it follows that confessions obtained as a consequence of *illegal detention* are similarly contaminated by infringement of that same constitutional authority.[143]

In the instant case, despite Ohio statutory requirements[144] identical to Rule 5(a) of the Federal Rules of Criminal Procedure, petitioner was detained in custody for more than 76 hours without charge. Although he was intensively questioned during this period, he denied implication in the murder for more than 71 of these hours.

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[140] Rule 5(a), Federal Rules of Criminal Procedure: "An officer making an arrest * * * shall take the arrested person *without unnecessary delay* before the nearest available commissioner * * *." (Emphasis supplied.)

[141] 371 U. S. 471 (1963).

[142] See Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483 (1963).

[143] It cannot be denied at this late date that both illegal arrests and detention for excessive periods are both unreasonable seizures of the person in violation of the Fourth Amendment.

[144] Ohio Revised Code, Sec. 2935.05, reads, in pertinent part:

"When a [law enforcement officer] has arrested a person without a warrant, he shall, *without unnecessary delay* take the person arrested before a court or magistrate * * *." (Emphasis supplied.)

The record demonstrates that the delay in arraignment was not necessary for any valid purpose. During this period and before any confession was obtained, court was open, a magistrate was available, and, if the arresting officers had elected to do so, petitioner could have been charged and arraigned before his confession. Furthermore, after a confession satisfactory to the interrogating officers had been obtained, they lost no time in charging petitioner with first degree murder, even though the court house had been closed to the public for some time.

The juxtaposition of these facts leaves little doubt that petitioner was deliberately held incommunicado without charge for the sole purpose of extracting a confession from him. And it is equally clear that, but for the illegally extended detention, his confession would not have been obtained at all.

Thus, this case provides an abundant opportunity for this Court to apply the *McNabb-Mallory* rule of exclusion of confessions to the states as a command of the due process clause of the Fourteenth Amendment—a rule whose constitutional stature has been long overdue.

V.

PETITIONER HAS NOT UNDERSTANDINGLY, KNOWINGLY AND DELIBERATELY WAIVED HIS FEDERAL CONSTITUTIONAL RIGHTS.

In this capital case, the Ohio Supreme Court has sought to avoid its responsibility of deciding the important questions of arrest, search and seizure and confessions discussed in Arguments III and IV, *supra*, pp. 31-58, by an alternate holding (after dismissing these constitutional issues rather summarily on their merits) that petitioner has waived them by his own conduct. In what has become its traditional judicial behavior, the court of last resort in

Ohio has found the doctrine of waiver to be a convenient tool to avoid implementing the criminal due process decisions of this Court.[145]

After defense objection at the trial to the admission of the illegally seized evidence, and after the same objection was assigned as error in the Ohio Supreme Court and dealt with there on its merits, that court observed that the defense failed to preserve the issues of arrest and search and seizure for review because "[t]here was * * * no reason for not raising the question * * * by motion to suppress prior to trial or objection at trial" [146] and because "several of the items allegedly seized illegally were introduced in evidence by defendant and he identified several of the State's exhibits on direct examination." [147]

After defense objection during the State's case in chief to prosecution testimony as to oral confessions made by petitioner, after the issue was urged by the defense and considered on its merits in both the Court of Appeals and Ohio Supreme Court opinions, the latter court noted that, since the petitioner had testified during the case for the

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[145] E.g., *Brookhart v. Janis*, 384 U. S. 1 (1966). Note also the Ohio Supreme Court's general reluctance to follow this Court's explicit commands. Cf. *Doughty v. Sacks*, 173 Ohio St. 407, 183 N. E. 2d 368, vacated and remanded sub nom. *Doughty v. Maxwell*, 372 U. S. 781 (1963); *Doughty v. Sacks*, 175 Ohio St. 46, 191 N. E. 2d 727, reversed sub nom. *Doughty v. Maxwell*, 376 U. S. 202 (1964); *State v. McLeod*, 173 Ohio St. 520, 184 N. E. 2d 101, vacated and remanded, 378 U. S. 582 (1964); *State v. McLeod*, 1 Ohio St. 2d 60, 203 N. E. 2d 349, reversed, 381 U. S. 356 (1965). See also *State v. Arrington*, 2 Ohio St. 2d 172, 207 N. E. 2d 557 (1965); *State v. Arrington*, 3 Ohio St. 2d 61, 209 N. E. 2d 207 (1965); *State v. O'Connor*, 177 Ohio St. 181, ___ N. E. 2d ____, vacated and remanded, 382 U. S. 286 (1965); *State v. O'Connor*, 6 Ohio St. 2d 169, 217 N. E. 2d 685 (1966); *State v. Bernius*, 177 Ohio St. 155, 203 N. E. 2d 241, 243 (1964).

[146] *State v. Woodards*, 6 Ohio St. 2d 14, 215 N. E. 2d 568, 575 (1966).

[147] *Ibid.*

defense to facts which differed from the alleged confessions only in such details as (a) whether the victim's death was accidentally or deliberately caused and (b) whether the sexual intercourse which preceded the victim's death was voluntary or involuntary on her part,[148] "he waived any objection he might have made to the testimony of the prosecutor's witness with regard to the confessions * * *."[149]

It is petitioner's contention that (A) the arrest, search and seizure issues were adequately preserved in the trial court; (B) the confession issues were adequately preserved in the trial court as well; (C) both issues must be presumed to have been preserved because of appellate consideration of these questions on the merits; and (D) an independent examination of the record compels the conclusion that petitioner did not knowingly and deliberately waive his federal constitutional rights.

A.

The Arrest, Search and Seizure Issues Were Adequately Preserved.

While it is true that no motion to suppress illegally seized evidence was filed in advance of trial, objection to its introduction into evidence was interposed by the defense at the trial. Until it was offered at the trial, defense counsel was unaware that the evidence had been seized from petitioner's house, or that the prosecution planned to introduce it.[150] Accordingly, it is apparent that defense counsel, taken by surprise, raised the issue at the earliest

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[148] Rather significant differences in a trial in which the accused was charged with rape and murder.

[149] *State v. Woodards*, 6 Ohio St. 2d 14, 215 N. E. 2d 568, 574 (1966).

[150] R. 485.

possible time. Under such circumstances no motion to suppress is necessary.[151]

Moreover, the Ohio Supreme Court's view that petitioner had waived his objection to the illegal arrest, search and seizure because he offered some of the seized items in evidence himself and identified them *after his objection to their introduction had been overruled,* is totally indefensible. This is not a case of permissible use of illegally seized evidence to impeach the credibility of the testimony of the accused.[152]

Here the prosecution offered the disputed evidence over the objection of the defense during its own case and before the petitioner had done anything to justify its use for impeachment purposes. Petitioner's subsequent testimony and offer of additional items must be classified as responsive only—an attempt to mitigate the damage done by the court's earlier erroneous admission of the evidence. It cannot be the law that an accused on trial for his life must elect, at his peril, between making the best presentation to the jury he can muster and preserving a clear record. Where the prosecution induces the use of illegally seized evidence, the defense of such use on grounds of impeachment is not available.[153]

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[151] See *Gouled v. United States,* 255 U. S. 298 (1921): "* * * where * * * it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission * * * and to consider and decide the question as then presented. * * *

A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." Accord: *Agnello v. United States,* 269 U. S. 20 (1925); *Amos v. United States,* 255 U. S. 313 (1921); *Bock v. Cincinnati,* 43 Ohio App. 257 (1931).

[152] *Walder v. United States,* 347 U. S. 62, 66 (1954); *cf. Agnello v. United States,* 269 U. S. 20 (1925).

[153] *Agnello v. United States,* 269 U. S. 20 (1925).

B.

The Confession Issues Were Adequately Preserved.

The Ohio Supreme Court has suggested that petitioner's election to take the stand in his own defense to rebut, insofar as he could, the damaging effect of evidence of his confessions somehow constitutes a waiver of his constitutional objections to their admission. Such a notion would be ludicrous but for the realization that while petitioner stands condemned to death, such specious reasoning blocks adequate review of one of the serious defects in his trial.

Piously incanting that "[d]ue process of law does not require that defendant be permitted to give his version of the event while having previous statements which he made excluded from the trial," [154] the Ohio court of last resort fails to recognize that the prosecution introduced the confessions *over timely defense objection* during its own case, before petitioner took the stand in his own defense. If the court had refused to admit the confessions in evidence at that time, one can only speculate what might have occurred during the balance of the trial. Perhaps petitioner would not have elected to testify in his own behalf, in order to avoid the devastating cross-examination and rebuttal testimony which inexorably followed his testimony. Perhaps the defense would have spent more effort in cross-examining the fingerprint expert for the prosecution, or produced expert testimony of its own, if the proof of petitioner's presence in the decedent's house at the time of her death had been less clear. The possibilities are endless. It will not do, however, to suggest that a finding of non-waiver on these facts would allow petitioner to testify to his version of the facts with-

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[154] *State v. Woodards*, 6 Ohio St. 2d 14, 215 N. E. 2d 568, 574 (1966).

out fear of impeachment. For, assuming suppression of the confessions, if petitioner had elected to testify as he did, all of the prosecution witnesses could quite properly have testified on rebuttal.[155]

The evil in the conception of the Ohio Supreme Court is that, upon an erroneous ruling at the trial admitting the devastating confessions, that judicial body would require the accused to stand mute, secure in the knowledge that his appellate record was pure, or attempt to rebut the confessions, all the while waiving his constitutional right to attack the confessions on appeal. Any humane doctrine of waiver cannot compel such a cruel choice.

Moreover, even the participants at the trial knew that defense objection to the confessions remained a vital issue in the case after petitioner's testimony, for the court so charged the jury without objection from the prosecution.[156]

The after-the-fact justification of a tainted trial by the Ohio Supreme Court will not bear close analysis.

C.

Appellate Review of the Merits of These Issues Creates an Irrebuttable Presumption That They Were Properly Preserved.

It has already been pointed out that the Court of Appeals opinion in this case disposed of the merits of the issue of admissibility of the disputed confessions and that the Ohio Supreme Court opinion discussed (summarily and incorrectly, in petitioner's view) the merits of both the confessions and arrest, search and seizure issues, before deciding that petitioner had waived them all.

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[155] *Walder v. United States*, 347 U. S. 62, 66 (1954).

[156] R. 1126-1127.

It is here contended that this appellate treatment of these issues on their merits creates an irrebuttable presumption that these federal questions were timely and properly raised in the state courts.[157]

D.

Petitioner Did Not Waive His Federal Constitutional Rights Under the Federal Doctrine of Waiver.

This Court has most recently made it abundantly clear that "[t]he question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."[158] The federal standard of waiver has been sufficiently articulated so that some guide lines are available.

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U. S. 389; *Ohio Bell Telephone Co. v. Pub. Util. Comm.,* 301 U. S. 292." [159]

As a consequence of this presumption of non-waiver, the Court has held that "[p]resuming waiver from a silent record is impermissible." [160]

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[157] *Raley v. Ohio,* 360 U. S. 423, 436 (1959); *Whitney v. California,* 274 U. S. 357, 360-361 (1927); *Manhattan Life Ins. Co. v. Cohen,* 234 U. S. 123, 134 (1914); *Chambers v. B. & O. R. Co.,* 207 U. S. 142 (1907).

[158] *Brookhart v. Janis,* 384 U. S. 1 (1966); See also *Henry v. Mississippi,* 379 U. S. 443, 447 (1965): "* * * we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question."

[159] *Glasser v. United States,* 315 U. S. 60, 70 (1942).

[160] *Carnley v. Cochran,* 369 U. S. 506, 516 (1962).

Mr. Justice Murphy, speaking for the Court in *Glasser v. United States*[161] demonstrated the vigor of the federal presumption against waiver by imposing an affirmative duty upon the trial court:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.' *Patton v. U. S.*, 281 U. S. 276, 312-313."

In the leading federal case of *Johnson v. Zerbst*,[162] Mr. Justice Black, speaking for the Court, defined waiver as "an intentional relinquishment or abandonment of a known right or privilege," and that definition has been transported into review of state prosecutions.[163]

It is only when an accused, represented by counsel, "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in state courts, whether for strategic, tactical, or any other reasons that can verily be described as the deliberate by-passing of state procedures,"[164] that this Court will find the unambiguous waiver that the *Johnson v. Zerbst* definition requires. But in applying this test, Mr. Justice Brennan, speaking for the Court in *Fay v. Noia*,[165] cautioned:

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[161] 315 U. S. 60, 71 (1942).

[162] 304 U. S. 458, 464 (1938).

[163] *Brookhart v. Janis*, 384 U. S. 1 (1966).

[164] *Fay v. Noia*, 372 U. S. 391, 439 (1963).

[165] *Ibid.*

"At all events we wish it clearly understood that the standard here put forth depends on *the considered choice of the petitioner*. Cf. *Carnley v. Cochran*, 369 U. S. 506, 513-517; *Moore vs. Michigan*, 355 U. S. 155, 162-165. *A choice made by counsel not participated in by the petitioner does not automatically bar relief*. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E.g., *Rice v. Olson*, 324 U. S. 786." (Emphasis supplied.)

In *Henry v. Mississippi*,[166] the Court applied the habeas corpus rule of waiver announced in *Fay v. Noia*[167] to direct appeals from state prosecutions. In the course of his opinion for the Court, Mr. Justice Brennan suggested that the State has the burden of showing that conduct by the accused or his counsel which might otherwise be insufficient to show waiver was prompted by litigation strategy.[168]

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[166] 379 U. S. 443 (1965).

[167] 372 U. S. 391 (1963).

[168] 379 U. S. 443, 450, f. n. 7 (1965). In view of the fact that an Ohio statute gives broad discretion to appellate courts to review denials of constitutional rights not raised below, Ohio Revised Code, Sec. 2505.21, Mr. Justice Black's views, dissenting, are pertinent:

"Nor do I believe that Mississippi's procedural rule concerning the stage of a trial at which constitutional objection should be made is the kind of rule that we should accept as an independent, adequate ground for the State Supreme Court's refusal to decide the constitutional question raised by petitioner. In *Williams v. Georgia*, 349 U. S. 375, this court held that where a State allows constitutional questions to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. * * *" 379 U. S. at 455. (Dissenting opinion.)

Whatever standard of waiver the Ohio Supreme Court employed to find that petitioner's conduct prevented him from asserting his federal constitutional rights, it is clear that it did not apply the federal standard enunciated above.

The record is completely barren of any showing that petitioner knowingly and consciously and intentionally waived any of the arrest, search and seizure or confession issues here asserted; it is similarly silent as to any litigation strategy which might have motivated petitioner's counsel to by-pass state procedures. Nor is it easy to imagine any tactical reason for intentionally allowing in evidence testimony of confessions from the lips of the petitioner of a most incriminating sort or blood-stained clothing of the petitioner of a most damaging and inflammatory nature.

On such a record in a capital case, it is incumbent upon this Court to hold that each of the federal constitutional questions here presented has not been waived by petitioner.

CONCLUSION.

This case arises out of ugly beginnings—a brutal and senseless death. It is a case in which the cry for vengeance is a natural response to the outrage of a frightened community and the frustrations implicit in society's continuing struggle to control criminal conduct.

It is precisely in such cases as this, however, that the interposition of constitutional protections between the accused and the mob are most needed—and most sorely tested. We have long since discovered that brutality and lawlessness as government responses to brutal and lawless conduct is not only destructive of society's moral image of itself, but inefficient and unwise as well. And so

it is vital that each sordid case—including this one—must evoke our most dispassionate analysis and our most thoughtful response.

Petitioner has demonstrated that from his first contact with the arresting officers through his trial and appeals, federal constitutional protections were denied him. He was illegally arrested. His home was illegally ransacked by police. He was illegally detained and illegally interrogated. Coerced confessions and illegally seized evidence were introduced in evidence against him. Although his sanity was in issue, the trial court kept the testimony and the consideration of the jury within the limitations of an arbitrary and unworkable standard of social responsibility. And now the ultimate loss of rights which government can impose upon an individual—taking his life—is scheduled to provide a fitting climax to the proceedings.

The State of Ohio, through its court system, as a part of a judicial insurrection which this Court ought not to tolerate, has sanctioned the emasculation of criminal justice which is here presented for review.

Grant of certiorari in the instant case will give the Court an opportunity to consider broad and novel questions of constitutional importance, and to correct an egregious blot on the landscape of criminal justice.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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